No. 91-1326

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA and
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of petitioners, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), the Court summarized the portion of the Employee Retirement Security Act of 1974 ("ERISA") pertinent to determining the interplay between the federal statute and state law as follows:

The federal Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. (1976 ed. and Supp. V) subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans . . . The term "employee benefit plan" is defined as including both pension plans and welfare plans. The statute imposes participation, funding and vesting requirements on pension plans. 201-306, 29 U.S.C. §§ 1051-86 (1976 ed. and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure and fiduciary responsibility, for both pension and welfare plans. 101-111, 401-414, 29 U.S.C. §§ 1101-1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits. . . .

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. . . [Section] 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3) exempts from ERISA coverage employee benefits plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." [463 U.S. at 90-91 (footnotes omitted)].[1]

The immediate preemption question raised by this case is whether a statute such as the Equity Amendment Act —a District of Columbia statute that requires employers to provide, as part of the benefits payable under the District's workers compensation statute, health benefits equivalent to those included in the employer's own health benefit plan—is preempted by ERISA.

The D.C. Circuit viewed that question—properly, in our view, for reasons delineated in Part 1, *infra*—as

[1] There are also a number of explicit exceptions to the preemptive force of § 514(a), none of them directly pertinent here. *See* ERISA §§ 514(b) and (d), 29 U.S.C. §§ 1144(b) and (d).

turning *not* upon the proper interpretation of ERISA § 4(b)(3)'s "workers compensation" plan exemption, but upon the proper interpretation of the "relates to" language of ERISA § 514(a), the affirmative preemption provision.

The D.C. Circuit then stated three reasons why, in its view, the Equity Amendment Act "relate[s] to" employee health benefit plans within the meaning of ERISA §514(a) and is therefore preempted: (1) "by requiring that . . . new benefits be 'equivalent' to those already provided under an existing covered plan" (*Greater Washington Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1322); (2) "by defining the employers who are obliged to provide . . . new benefits as those who already provide benefits under a covered plan" (*id.*); and (3) by reason of "the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether" (*id.* at 1325).

The argument that follows is devoted to demonstrating that the D.C. Circuit erred in regarding any of these three intersections between the Equity Amendment Act and an ERISA-covered health benefit plan as a sufficient "relationship" to that plan to invoke ERISA § 514(a) preemption.

1. This Court has both stated that the term "relates to" in ERISA § 514(a) is a broad one and recognized that certain state law connections with or references to ERISA-covered employee benefit plans do *not* suffice to constitute the required relationship. Although at earlier stages of the process of litigating elucidation, the Court has declined to delineate the precise line separating those two classes of state laws, it is now time to do so.

2. Before proceeding to discuss the line-drawing issue, we explain, in Part 1, *infra*, why the reach of the § 514(a) "relates to" standard is in fact the determi-

native issue here. In describing the preemptive scope of ERISA, § 514(a) refers to the § 4(b) coverage exemptions. Section 514(a) includes this cross-reference to conform the coverage and preemption provisions of the statute by assuring that state laws are *not* preempted because of their impact upon exempted plans *alone*. The D.C. Circuit's preemption conclusion turned not on the relationship between the Equity Amendment Act and ERISA-exempt workers' compensation plans, but upon the interaction between the Equity Amendment Act and nonexempt health benefits plans. Thus, as the court below correctly understood, this case, at bottom, turns on the scope of ERISA's preemption provision, standing alone, not on the relationship between ERISA §§ 514(a) and 4(b).

3. Surveying both the ERISA legislative materials and this Court's ERISA preemption case law, it becomes apparent that Congress meant to preempt the class of state laws that *either* are specifically designed to affect ERISA-covered employee benefit plans particularly or that, while not so designed, in fact have a substantial and unavoidable impact upon the operation of such plans.

4. Under that dual standard, the interaction between the Equity Amendment Act and respondent's ERISA-covered health benefit plan does not rise to level of an ERISA § 514(a) relationship. Indeed, that interaction is most similar to the connection between ERISA-covered employee benefit plans and state law damages calculations where replacement of lost compensation is at issue. In both instances, the only possible impacts upon the actual operation of the ERISA-covered plans is that the employer could possibly be influenced by the economic consequences of the state law to alter the shape of its ERISA plan. Purely speculative economic effects of that kind are simply too tenuous to sustain preemption under § 514(a).

ARGUMENT

1. *The Necessity for Line Drawing:*

In *Shaw v. Delta Airlines*, *supra*, this Court noted that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan" and that "Congress used the words 'relate to' in § 514(a) in [this] broad sense." 463 U.S. at 96-98. At the same time, *Shaw* recognizes that some "state actions . . . affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," but declined at that juncture to "express . . . views about where it would be appropriate to draw the line." 463 U.S. at 100 n.21. "Relates to," in sum, is a broad, but not a limitless, term; not every "connection" and not every "reference" constitutes a § 514(a) relationship.

Since *Shaw*, this Court has had seven additional occasions to consider ERISA preemption issues. The opinions in the post-*Shaw* cases continue to repeat *both Shaw's* "connection with or reference to such a plan" language *and* the concomitant observation that some "connections with" or "references to" ERISA employee benefit plans are too insubstantial to "relate to" a covered plan within the meaning of § 514(a). *See, e.g.*, most recently, *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 St. Ct. 478, 483 (1990); *see also*, summarizing and relying upon the ERISA preemption cases in construing another statute, *Morales v. Trans World Airlines Inc.*, S. Ct. No. 90-1694, slip op. at 14 (June 1, 1992). And the Court has on several occasions implicitly, and on one occasion explicitly, held that there was *no* ERISA preemption despite *some* connection between a state law and employee benefit plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988).

None of these cases, however, marks with precision the line between connections supporting a preemptive result

and those too weak to warrant such a result. Because the real world of economic transactions creates an endless webb of connections, because state law regulates so many facets of these transactions, and because employee benefit plans are ubiquitous as a form of compensation in modern places of employment, the result has been an epidemic of ERISA preemption litigation.[2] Given the inherent tension between the two parts of *Shaw's* formulation of the ERISA preemption standard and the lack of subsequent guidance, the lower courts have tended to take a mechanistic approach to ERISA preemption that depends more on plucking boilerplate phrases at random from this Court's decisions than on reasoned statutory analysis.[3]

Until the limiting principles that place a particular legal rule in the overall structure of the law are enunciated, the rule's reach tends to expand incrementally until "the aggregate or end result is one that would never seriously have been considered in the first instance." *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973). In this instance, application of *Shaw's* "connection with or reference to" catchall formulation without due regard to this Court's repeated admonition that not all connections and not all references

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[2] An April, 1992 Lexis search for ERISA preemption cases turned up 400 cases in the federal district and circuit courts and the state appellate courts in 1991 and 1992 alone.

[3] In other instances, federal courts of appeals have made thoughtful and sensible attempts to develop a principaled approach to the linedrawing problem by collecting and categorizing decided ERISA preemption cases on each side of the dim *Shaw* line. *See, e.g., Memorial Hos. System v. Northbrook Health Ins.*, 904 F.2d 236 (5th Cir. 1990); *Aetna Life Ins. v. Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, —— U.S. ——, 110 S. Ct. 57 (1989); *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341 (1991); *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479 F.2d 149 (1986).

suffice has yielded results that cannot possibly be justified if one returns to the cases and considers the legislative materials afresh. *See* pp. 13-16, *infra*.[4]

For all these reasons, the corpus of ERISA preemption law has now reached the stage of "gestative propensity that calls for the 'line drawing' familiar in the judicial . . . process: "thus far, but not beyond." *12 200-Ft. Reels, supra*, 413 U.S. at 127. The Court in this case should therefore begin to delineate the line distinguishing

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[4] The circumstances of a few of these cases illustrates some of the anomalous results the lower courts are reaching.

Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), for example, holds preempted by ERISA suits by medical care providers against health benefit plans where the provider performed service to a patient in reliance upon erroneous information from the plan that the employee was covered for the services provided. Yet, because there is no cause of action under ERISA itself by which the provider can recover, the result is to displace well-developed common law rules concerning accountability for one's actions, to the detriment of a third party who is outside the employee benefit plan. *See* 944 F.2d at 1279 (Jones, J., dissenting) (contending that generally lower court ERISA preemption cases suffer from "an overzealous readiness in the federal courts to bar all state-law claims which even smell of ERISA . . . without engaging in the complex case-by-case analysis which the statute and precedent require," with the result that "such a boiler-plate unreflective approach to ERISA preemption . . . frequently leave[s] deserving claimants without recourse in state or federal court."). *Cf. Hospice of Metro Denver v. Group Health Ins. of Oklahoma*, 944 F.2d 752 (1991) (same issue, opposite result on the doctrinally irrelevant basis that no ERISA remedy is available to the health care provider).

Similarly, several courts have held that where an employer promises, as part of an individual employment contract, that certain benefit plans will be maintained, the employee has no state cause of action for breach of the employment contract if the plans are not in fact maintained, even if the result is to leave the employee with *no* remedy at all for the employer's breach of his explicit promise. *See, e.g., Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1991); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2nd Cir. 1992).

the circumstances in which a state law may be said to "relate to" an ERISA employee benefit plan within the meaning of the statute from those circumstances in which there is *some* connection between the state law and benefit plans, but that connection is too insubstantial to warrant displacing state authority.

In particular, the Court should make clear (1) that, as several lower court cases have held, it is *not* a "relationship" for ERISA preemption purposes that a state law takes into account in establishing a non-ERISA requirement the terms of an ERISA employee benefit plan; and (2) that it is *not* a "relationship" for ERISA preemption purposes that a state law imposes on employers a non-ERISA requirement that may have some impact upon an employee's economic decisions regarding its ERISA-covered plans.

2. The Relevance of the ERISA § 4(b)(3) Exception:

Before turning to the ERISA § 514(a) issue that is at the core of this case, we pause to explain why the D.C. Circuit was correct in holding that this case turns upon the reach of § 514(a)'s "relates to" language, and not on the relationship between §§ 514(a) and 4(b).

(a) Workers' compensaion benefit plans—like the disability benefit plans involved in *Shaw* and like unemployment compensation benefit plans—*are* "employee welfare benefits plans" within the meaning of ERISA's definitional and coverage provisions. *See* §§ (3)(1) and (4)a, 29 U.S.C. §§ 1002(1) and 1003(a). Specifically, § 3(1), 29 U.S.C. § 1002(1), defines "employee welfare benefit plan" as including, *inter alia*, plans providing sickness, accident, or disability benefits, of which workers' compensation benefits are a variety; and § 4(a), 29 U.S.C. § 1003(a), describes as covered by ERISA "any" employee welfare benefit plan established or maintained by an employer, and employe organization, or both.

ERISA § 514(a), in turn, preempts state laws "insofar as they . . . relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a). Thus, if that were all there were to the matter, § 514(a) would preempt state laws mandating workers compensation plans. *See Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12 (noting that *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981) held, correctly, that a state employee benefit plan *is* preempted by § 514(a)).

Section 514(a) goes on to say that state laws relating to employee benefit plans that are "exempt under § 1003(b)" are not preempted. Plans "maintained solely for the purpose of complying with applicable. . . workers' compensation laws" are exempt from ERISA coverage under § 4(b)(3), 29 U.S.C. § 1003(b)(3). The plain language of § 514(a), then, provides that there is *no* preemption of a state law simply because the law "relates to" a § 4(b)(3) exempt workers' compensation plan.

The purpose of the reference in § 514(a) to plans "exempt under § 1003(b) of this title," then, is to conform the preemption and coverage provisions of the statute's text.[5] In particular, the § 1003(b) cross-reference assures that the very state laws that would otherwise insulate § 4(b)(3) plans from affirmative ERISA coverage are not preempted.

The syntax of ERISA § 514(a), however, makes lucid that state laws *are* preempted insofar as the laws "re-

[5] The conforming language is structurally necessary because, as this Court opined in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), "ERISA's plain language . . . preempts not plans, but 'State laws.'" Section 4(b), on the other hand, exempts from ERISA coverage generally not state laws but certain plans. *Id.* Thus, § 4(a), which exempts § 4(b) *plans* from the affirmative coverage of ERISA's substantive provisions, would not, absent some explicit statement in that regard, exempt *laws* relating to those plans from the ERISA preemption provisions.

late to" ERISA employee benefit plans *not* exempt from ERISA coverage under § 4(b), whether or not the state law also relate to exempt plans.[6]

(b) Accordingly, in *Shaw*, this Court, addressing the validity of a state law that mandated certain disability benefit provisions, applied just this understanding of ERISA § 514(a):

First, the *Shaw* Court held that the disability benefit law in question did " 'relate to' an employee benefit plan" within the meaning of ERISA § 514(a) because the state law "requires employers to pay employees certain benefits." 463 U.S. at 96-97.

Second, *Shaw* determines that the state statute is nonetheless *enforceable* with respect to an employer disability benefit plan that "provides only those benefits required by the applicable state law," because of the exclusion from preemption for laws relating to plans exempt from ERISA under § 4(b). 463 U.S. at 107.

At the same time, the Court in *Shaw* held the state statute unenforceable insofar as it *required* that employers provide certain disability benefits within "benefit plans [that] . . . provide benefits not required by that law." 463 U.S. at 106-107. "[T]hose portions of the Airlines' multibenefit plans maintained to comply with the Disability Benefits Law. . . are not exempt from ERISA and are not subject to state regulation." *Id.* at 107. While "[a] State may

[6] The statute, for example, could have provided, but does not, that ERISA supersedes state laws "insofar as they . . . relate to any employee benefit plan described in § 4(a)" but "shall not supersede any law relating to any employee benefit plan exempt under § 4(b)." In that event, the statutory language would have been ambiguous with regard to state laws bearing the requisite relationship to *both* ERISA-covered and non-ERISA covered employee benefit plans. As actually drafted, however, the language negates any possible ambiguity, by making clear that the requisite relationship to an ERISA-covered benefit plan is sufficient, without regard to any additional relationship to a non-covered benefit plan.

require an employer to maintain a disability plan complying with state law as a separate administrative unit" (*id.* at 108, emphasis supplied), a state may only permit, but not require, an employer to comply with state law by including mandated disability benefits *within an ERISA-covered plan* (*id.*).

(c) The D.C. Circuit's understanding of this aspect of *Shaw* was not strictly accurate: The court of appeals said that "[t]he key issue in distinguishing *Shaw* from this case is that the Court in *Shaw* never found that the New York Disability Benefits Law related to an *ERISA-covered plan*." 948 F.2d at 1323 (emphasis in original). In fact, as recounted above, this Court *did* find that the New York disability law "related to" an *ERISA-covered* plan insofar as New York required that employee benefit plans providing benefits *other* than those mandated by state law also provide mandated disability benefits.

That infelicity aside, the D.C. Circuit got the threshold point right. Insofar as *Shaw upheld* the New York Disability Law, it was because "[t]he [only] plan to which the New York Disability Benefits Law related *was* exempt, so the law did not qualify at the threshold for preemption." 948 F.2d at 1323.[7]

Nothing in *Shaw*, then, insulates from ERISA's preemptive reach state laws that relate to *both* ERISA-covered employee benefit plans and benefit plans exempt from ERISA coverage under § 4(b). The outcome of this case, then, turns upon whether or not the points of intersection between the Equity Amendment Act and ERISA-covered health benefit plans constitute, as the D.C. Circuit held, a sufficient relationship between the statute and those plans to trigger ERISA § 514(a) preemption.

[7] As we note below (at p. 16), under this analysis, the Court in *Shaw* necessarily held there is *not* a sufficient relationship to trigger preemption where the State provides a non-ERISA compliance option, but also permits compliance through an ERISA-covered plan.

3. *The Reach of ERISA § 514(a) Preemption Generally:*

Shaw considered not only ERISA § 4(b)(3) and the interaction of that provision with ERISA § 514(a) provisions, but also addressed the correct interpretation of § 514(a) standing alone.

(a) *Shaw* concerned two state laws, one the Disability Benefits Law discussed above, mandating the payment of certain benefits from employee benefit plans, the other a state law prohibiting pregnancy-based discrimination in employee benefits plans. The state statutes, then, directly and substantially controlled the operation of employee benefits plans (although not necessarily, as discussed above, ERISA-covered employee benefit plans), by mandating in certain respects how those plans are to operate. 463 U.S. at 97 ("the Human Rights Law . . . prohibits employers from structuring their employee benefits in a manner that discriminates on the basis of pregnancy, and the Disability Benefit Law, . . . requires employers to pay employees specific benefits.")

Shaw concluded that the relationship between each of these two statutes and ERISA-covered benefit plans comes within the preemptive reach of § 514(a). In coming to that conclusion, the Court considered and rejected two specific arguments limiting the reach of § 514(a). Those arguments set the context in which *Shaw's* "connection with or reference to" standard was first enunciated.

First, the state in *Shaw* maintained that "§ 514(a) . . . preempt[s] only state laws specifically designed to affect employee benefit plans." 463 U.S. at 98. Because "[i]t would have been unnecessary to exempt generally applicable state criminal statutes from preemption. . . if § 514(a) applied only to state laws dealing specifically with ERISA plans," and because ERISA § 514(b)(4) states just such an express affirmation of state criminal law authority, the Court rejected that contention. At the same time, there is nothing in *Shaw* embracing the converse proposition, that whenever a state statute *does* men-

tion employee benefit plans in a way that includes ERISA-covered plans, that state statute is, without more, pre-empted.

Second, on the basis of the legislative history of § 514(a), *Shaw* disavowed New York's suggestion that ERISA "can . . . be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA —reporting, disclosure, fiduciary responsibility, and the like." 463 U.S. at 98.

That history showed that earlier versions of ERISA's preemption provisions would have superseded state laws "relat[ing] to" only the particular aspects of employee benefit plans regulated by ERISA. As the legislative process went forward the locution of the requisite pre-emptive intersection between the federal law and state laws—"related to"—remained unchanged. *See* 463 U.S. at 98 n.18. But as the legislation progressed, the class of state laws that were to be preempted was enlarged to include not only state laws that regulate benefit plans in the same way ERISA regulates such plans—in the case of employee welfare benefit plans by requiring reporting, disclosure, imposing fiduciary responsibility, and providing certain remedial provisions—but also state laws generally regulating benefits plans.[8]

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[8] The language of ERISA § 514(a), on its face, does not unmistakably indicate that broad "field" preemption is intended. Unlike the preemption language in some other statutes, § 514(a) does *not* flatly prohibit the enactment or enforcement of state laws within a given field of application. *Compare, e.g.*, 49 U.S.C. § 1305(a)(1) ("no State . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"); *see also Morales v. Trans World Airlines, supra*, construing that section as broadly preemptive, in reliance on the ERISA preemption cases.

Instead, § 514(a) provides that "the provisions of this title and title IV shall *supersede* any and all State laws" relating to ERISA-covered employee benefit plans. (Emphasis supplied). Read without regard to the legislative history, one could well have concluded that a federal statutory "provision" can "supersede" a state law only

Thus, in every instance, the members of Congress who managed the bill in the House and the Senate, quoted in *Shaw*, described the final, conference version of § 514(a) as preempting state actions specifying in some manner *requirements* for the operation of ERISA plans, not as preempting laws which merely mention ERISA plans or have some derivative impact on those plans or on employer behavior with respect to those plans. For example, Representative Dent, in the passage quoted in *Shaw*, stressed that the conference version of § 514(a) was intended to assure "the reservation to Federal authority [of] the sole power to *regulate* the field of employee benefit plans . . . by eliminating the threat of conflicting and inconsistent State and local regulation." 463 U.S. at 99, *quoting* 120 Cong. Rec. 29197 (1974) (emphasis supplied). Similarly, Senator Williams referred to an intention "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local *regulation*." *Id.*, *quoting* 120 Cong. Rec. at 29933 (emphasis supplied). And Senator Javits said that § 514(a) addresses "the desirability of further *regulation* —at either the State or Federal level." *Id.* at 99 n.20, *quoting* 120 Cong. Rec. 29942 (1974) (emphasis supplied); *see also* Senator Javits' comment, in a colloquy not quoted in *Shaw*, that with respect to plans providing prepaid legal services "it is intended that State regulation—but not bar association ethical rules, guidelines, or disciplinary actions" be preempted, Legislative History of ERISA, 4789 (Sen. Labor Sub. Print, 1976); *id.* ("the State, directly or indirectly through the bar, is preempted

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insofar as there is the particular federal provision covers an issue addressed by that state law; under this view, where there is no ERISA provision available to override a state law on a common subject, the state law could be enforced.

Consequently, *it is ERISA legislative history*, not the statutory language standing alone, that provides the requisite evidence that broad field preemption was intended, and that indicates the limitations of that broad field preemption as well.

from *regulating* the form and content of a legal service plan") (emphasis supplied).

Shaw in two respects recognizes, moreover, that the "relate to" connection must ordinarily be one pursuant to which the state law substantially and necessarily affects ERISA-covered employee benefit plans and that a mere contingent impact, a simple mention, or remote, derivative effect is *not* an ERISA § 514(a) relationship.

First, as noted above, *Shaw* explicitly states that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21. The very locution used—that § 514(a) concerns "state actions" that "affect" employee benefit plans—demonstrates that there must, at a minimum, be *some* impact on the plan because of the state action; state laws that mention or refer to employee benefit plans not in order to affect the plans but in order to accomplish some other end plainly do not come within this language.

Second, *Shaw* necessarily—although without directly so acknowledging—approved as *not* "relating to" an ERISA-covered employee benefit plan a state statute that provides employers with the *option* of complying by altering an ERISA-covered plan, or by creating a free-standing, non-ERISA covered compliance scheme.[9] A valid state disability benefits statute, according to *Shaw*, could permit, but not require, compliance through inclusion of mandatory disability benefits in an ERISA-covered plan. Presumably, such a statute, or its implementing regulations or adjudicatory decisions, would have to so state, so that employers could be aware that this option exists.

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[9] The D.C. Circuit opinion in this case missed this point because that court misunderstood the factual context of *Shaw*. *See* p. 6, *supra*. Since the D.C. Circuit was erroneously of the view that no ERISA-covered employee benefit plan was at issue in *Shaw*, that court did not recognize that the Disability Benefits Law in *Shaw*, as upheld, *did* have *some* connection to an ERISA-covered plan.

Shaw, therefore, necessarily determined that the state law under attack would *not* "relate to" the ERISA-covered plan simply because the state statute *mentions* the possibility of compliance through that plan, or because the state permitted employers, on an *optional* basis, to substitute compliance through an ERISA-covered plan for compliance through an option not within ERISA's coverage.

Put another way, had those tenuous connections to ERISA-covered plans been sufficient to bring a state law within the "relate to" language of § 514(a), *Shaw* could not have allowed the state to "force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108; *see also id.* at 109 ("[w]e further hold that the Disability Benefits Law is not preempted by ERISA, although New York may not enforce its provisions through *regulation* of ERISA-covered benefit plans.")

In short, *Shaw* cannot fairly be read as holding interactions between employee benefit plans and state laws of the weak kind relied upon by the D.C. Circuit here are sufficient to constitute a § 514(a) relationship. To the contrary, the *Shaw* opinion and the legislative history upon which the opinion relies is that Congress intended the broad reach of § 514(a) to extend to all state laws with an impact upon the internal operation of employee benefit plans that is both substantial and unavoidable.

(b) The results and analyses in all the post-*Shaw* decided cases are consistent with the basic standard just set forth with one caveat: The Court has evolved a special rule for those *sui generis* state laws that are expressly designed to affect ERISA-covered employee benefit plans *alone*. Taking motive as sufficient to demonstrate effect, the Court has in those instances not inquired into either the actual impact of the statute or whether that impact

is avoidable, but has instead declared such statutes preempted, without more.

(i) *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)—the next case after *Shaw* in the ERISA preemption line—and *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41 (1987) (which is analytically indistinguishable from *Metropolitan Life* for present purposes) involved state laws substantially affecting whether or not employee benefit plans generally (but not ERISA-covered benefit plans particularly) are required to pay benefits under certain circumstances.[10] The state action in each instance could be said to effect benefit plans "indirectly" (*Metropolitan Life Ins. Co.*, 471 U.S. at 739), rather than directly, but only in the sense that the state rule in question was in terms addressed not to benefit plans as such, but to the insurers who provide benefits under such plans.[11] Since

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[10] *Metropolitan Life* involved a state law mandating that certain benefits be paid under any group health plan. *See* 471 U.S. at 729-30. *Pilot Life* did not specify particular benefit payments, but set standards for judging the behavior of employee benefits plan administrators in determining whether or not the terms of the plan require payment of benefits. 481 U.S. at 48. The distinction between these two kinds of mandatory requirements governing the payment of benefits by employee benefit plans is immaterial to ERISA preemption.

[11] This was also the sense in which the Court in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 525 used the term "indirect" in describing the reach of ERISA § 514(a). In that case, the state statute in question was part of its workers' compensation law, but *necessarily* affected pension plans as well by prohibiting those plans from setting off workers' compensation benefits against pension benefits. *Id.* at 521. The effect on pension plans was "indirect" only in the sense that the statute *in terms* was a protection of the right to workers' compensation benefits, not a limitation upon the pension benefit plans. But the latter impact was in no way speculative or contingent; rather, a pension benefit plan that provided for workers' compensation setoffs would violate state law.

As *Alessi* explained, the reason for including state action indirect in this sense was "to preclude the States from avoiding through

insurers not in compliance with the state payment standard would not be available to employee benefit plans in the state at all, the impact upon insured plans was in no way speculative, contingent, or derivative.

As Metropolitan Life put the point, the impact upon "*all* insured benefit plans" was "substantial[]", since the statute in question "requires" that such plans process and pay benefits in a certain manner. 471 U.S. at 739 (emphasis added); *see also FMC Corp. v. Holliday*, —— U.S. ——, 111 S. Ct. 403, 408-09 (1990) (holding that a state statute that "*prohibits* plans from being structured in a manner requiring reimbursement in the event of recovery from a third party" (emphasis supplied) is preempted because the statute *dictates* the employee benefit plan's payment formulae.)[12]

(ii) *Fort Halifax Packing Co. v. Coyne*, *supra*, did not turn on the meaning of the "relate to" phrase in ERISA § 514(a), since the Court concluded that the state law at issue in that case did not concern any "employee benefit *plan*" at all. 482 U.S. at 7-8. *Fort Halifax* is nonetheless relevant here for two reasons.

The Maine severance benefit statute in *Fort Halifax* provided that an employer must, upon closing a plant, pay either a severance benefit specified by state law or pay the benefits due under a contract providing for severance benefits. *Id.* at 5. The Court concluded that such a state-specified payment does not constitute an "employee benefit plan" because there is no ongoing obligation to make repeated payments. 482 U.S. at 7-8. The Court also recognized, however, that an employer's own contractual commitment to pay severance benefits could well constitute an employee benefit plan within the meaning of ERISA. 482 U.S. at 6 n.4, *citing Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986). Thus, like *Shaw*, *Fort Halifax* necessarily held that as long as a state law creates one compliance option not covered by ERISA, there is no preemptive "relation to" an ERISA-covered employee benefit plan simply because the state provides an alternative of complying with its requirement through such a plan as well.[13]

Second, and more generally, *Fort Halifax* explains the purposes of ERISA preemption at some length, in a

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form the substance of the pre-emption provision." 451 U.S. at 525. *See also* p. 25, n.16, *infra* (discussing *Alessi's* reliance on § 514(c)(2), the definition of "State" within the preemption section, as the source of its conclusion that indirect as well as direct state action is precluded.)

[12] *FMC Corp.*, one of this Court's recent ERISA preemption cases, is instructive as well in demonstrating that while the Court continues to repeat the *Shaw* pronouncement that a state statute "relate[s] to" an employee benefit plan if the law has a "'connection with or reference to such a plan'" (*see* 111 S. Ct. at 407), the Court has never rested a preemption conclusion upon a state law's mere mention of an ERISA-covered employee benefit p[illegible]. In *FMC Corp.*, for example, the Court, after noting that the statute in question, as a verbal matter, did have a "reference" to employee benefit plans (111 S. Ct. at 408), went on to conclude that the state law had a "connection" to benefit plans of a kind that had a substantial and unavoidable impact upon the internal operations of those plans (*id.* at 408-09). If a mere "reference" to benefit plans were sufficient, the bulk of the "relate to" analysis in *FMC Corp.* would have been entirely superfluous.

[13] It is worth noting that providing an optional ERISA-covered compliance alternative necessarily intersects with and impacts upon the ERISA-covered employee benefit plan in several ways: First, the state statute, regulation, or decision providing the option almost certainly will "refer to" the ERISA-covered plan. Second, it is almost inevitable that there will be some practical incentive to choose the ERISA-covered compliance alternative, simply because the cost of maintaining one scheme for paying benefits is likely to be less than the cost of maintaining two separate schemes. Indeed, a statute such as the one involved in *Fort Halifax* provides an additional inducement, since an employer can apparently opt out of the statutorily-required benefits by paying contractual severance benefits in *any* amount.

manner that supports the conclusion that only substantial and unavoidable impacts upon the actual operation of employee benefit plans were ordinarily meant to be preempted:

> Statements by ERISA's sponsors in the House and Senate clearly disclose the problem that the preemption provision was intended to address. . . .
>
> These statements reflect recognition of the administrative realities of employee benefit plans. . . . The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to different *regulatory requirements* in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some states but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others. . .
>
> ERISA's pre-emption provision was prompted by recognition that employer's establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation. . . *Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.* [471 U.S. at 9-11 (emphasis supplied).],

See also id. at 10-11 (reviewing the earlier cases in which ERISA preemption was found, and concluding that "We have not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's *administrative scheme* would be subject to conflicting *requirements.*") (emphasis supplied).

Thus, *Fort Halifax*'s analysis of the scope of ERISA preemption indicates that § 514(a), for all its breadth, would *not* apply where there is some tie between a state law or regulation and an employee benefit plan, but that tie does not necessarily subject plan designers and administrators to differing requirements in structuring and operating the plan.

(iii) *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) is most easily deciphered by analyzing its second holding separately, and by then considering its initial holding in connection with *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990).

Mackey held that a general state garnishment statute—permitting garnishers to make employee benefit plans parties to a suit and to secure a court order requiring the plan to pay benefits to someone *other* than the designated beneficiary—does *not* sufficiently "relate to" an employee benefit plan so garnished to invalidate the state law. 486 U.S. at 835-36. In coming to that conclusion, the *Mackey* Court did not deny, as it could not, that a state garnishment proceeding against an employee benefit plan had a "connection with" that plan, and *some* likely impact upon its internal administration. 486 U.S. at 831-32. Rather, *Mackey* said that the connection in question did not suffice.

In reaching that conclusion, *Mackey* surveyed the legislative materials as a whole to determine whether the particular connection between employee benefit plans and state garnishment procedures is one Congress intended to include an ERISA § 514(a) relationship. The Court's conclusion was that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits." 486 U.S. at 831-32 (emphasis supplied).

In other words, *Mackey* viewed the garnishment proceedings against an employee benefit plan as an adjunct to an underlying and otherwise valid, non-ERISA legal proceeding against the individual plan beneficiary. Insulating those judgments from enforcement against assets with substantial economic value would have compromised the state's ability to enforce rules of conduct entirely unrelated to ERISA, because of a real but quite minor impact upon the operation of ERISA employee benefit plans. This, said the Court, Congress had not intended to do.

(iv) The other aspect of *Mackey*, and the first of the two alternative holdings in *Ingersoll-Rand*, treated with state rules of decision in adjudication that had *no* non-ERISA-related purpose.[14] Indeed, in both *Mackey* and *Ingersoll-Rand*, the state law in question applied not to employee compensation generally, or even to employee benefit plans generally, but only to *ERISA*-covered benefit plans. *See Mackey*, 486 U.S. at 829; *Ingersoll-Rand*, 111 S. Ct. at 483 ("in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment.") As such, the exclusion from garnishment proceedings for ERISA-covered benefits plans *only* (*Mackey*, 486 U.S. at 828-29), and the cause of action for ERISA pension-defeating termination *only* (*Ingersoll-Rand*, 111 S. Ct. 481) were "specifically *designed* to affect employee benefit plans' ". *Ingersoll-Rand*, 111 S. Ct. at 483, *quoting Mackey*, 486 U.S. at 829) (emphasis supplied).

These unusual state laws, in other words, did not simply mention, refer to, or have a derivative effect upon

[14] In *Ingersoll-Rand*, the Court rested its holding not solely upon § 514(a) preemption but, independently, upon the conclusion that "the Texas cause of action would be preempted because it conflicts directly with an ERISA cause of action." 111 S. Ct. at 484. Thus, the "relates to" analysis in *Ingersoll-Rand* was not necessary to the result reached in that case.

ERISA-covered employee benefit plans in the course of accomplishing some separate objective within the state's legitimate area of concern. Instead, both state laws were *directed precisely at affecting ERISA-covered plans, and such plans alone. See Mackey*, 486 U.S. at 838 n.12 (emphasis supplied) (it is "singl[ing] out ERISA plans, by express reference, *for special treatment*", and not the bare reference to benefit plans in the statute, that "preempts the Georgia antigarnishment exception.")[15]

[15] It was thus critical to the result in *Mackey* that the general garnishment statute was held *non*preempted. If, instead, the Court had concluded that the general garnishment statute *is* preempted as applied to ERISA-covered employee benefit plans, then the statutory "special treatment" for those plans would have been compelled by the federal scheme, and statutory references to that exclusion could not have been the basis, standing alone, for concluding that the exclusion evidenced a state purpose to affect employee benefit plans.

Similarly, state tax statutes must often "refer to" employee benefit plans in the purely verbal sense in order to explain whether contributions to or benefits paid by those plans are treated as taxable income or not, and, if the plan contributions or benefits are taxable, to provide for the tax calculation. *See, e.g., Retirement Fund Trust v. Franchise Tax Board*, 909 F.2d 1266, 1270 n.13 (9th Cir. 1990). The alternative of ignoring in state tax laws, regulations, and decisions the state tax treatment of ERISA employee-benefit-plan related contributions or benefit payments is entirely impractical.

Those contributions and benefits have real world economic value, are often provided as tradeoffs for taxable cash income, and resemble taxable income in that they are basically a form of compensation for employment. Obviously, these explanatory verbal references to employee benefit plans cannot, alone, sustain the conclusion that the statute "relates to" an employee benefit plan and is therefore preempted by ERISA.

Moreover, there is no self-evident answer to the question whether it is taxing or not taxing the various economic values employee benefit plans generate for participants that "relates to" the employee benefit plan; rather, in *either* case the state law "relates to" the plan both in the verbal sense *and* in the sense that the tax treatment may well affect whether contributions to the plan

This aspect of *Mackey* and the holding in *Ingersoll-Rand*, consequently, do *not* rest simply upon the linguistic mention of ERISA-covered employee benefit plans in a state statute. Both decisions do state, however, a special doctrinal corollary to the principles that have generally governed the interpretation of the "relates to" language of § 514(a): Where the state statute singles out *ERISA-covered* employee benefit plans particularly for unique treatment and does so for the principal purpose of directly affecting those plans, the Court has proscribed such direct state entries into the governance of ERISA plans, without regard to the actual impact of the statute upon ERISA plans. In effect, the Court has determined that where the central role of a state statute is precisely to affect *only* the federal interests in ERISA-covered employee benefit plans, there is no reason to apply a more flexible preemption standard in order to accommodate legitimate, non-ERISA-related state interests.[16]

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will be made at all, if so in what amounts, and when, and in what amount and when benefit payments will be made.

Consequently, the few courts that have addressed ERISA preemption of state tax statutes have generally regarded a neutral tax law that broadly " 'applies to employees without regard to their status as ERISA participants "as one that does not 'relate to' ERISA plans" and is therefore not preempted, even if the result is to tax ERISA benefit plan contributions or benefit payments. *Retirement Fund Trust v. Franchise Tax Board*, 909 F.2d at 1282; *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987).

Conversely, where employee benefit plans themselves are singled out for unique taxes not otherwise levied on similar economic entities and transactions, such taxes are held to come within ERISA § 514(a), as state laws that single out benefit plans for special treatment. *E-Systems v. Pogue*, 929 F.2d 1100 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S. Ct. —— (1991); *General Motors v. California Board of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 491 (1988).

[16] We note that this understanding of the ERISA § 514(a) analysis of *Ingersoll-Rand* may explain one aspect of that decision that is otherwise difficult to square with established principles of statutory

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construction generally, and of the construction of § 514 particularly.

ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2), provides: "The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, *which purports to regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." (emphasis supplied). *Alessi v. Raybestos-Manhattan, Inc., supra*, relied upon this section of the statute as providing guidance in determining the preemptive scope of the "relates to" language of § 514(a), "mak[ing] clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal jurisdiction." 451 U.S. at 525.

In *Ingersoll-Rand*, however, without acknowledging at all the reliance of *Alessi* upon § 514(c)(2), the Court indicated that the *only* statutory role of that provision is to include within ERISA's preemptive scope "state agencies and instrumentalities whose actions might not otherwise be considered state law." 111 S. Ct. at 484. That construction of § 514(c)(2), if applied generally, would conflict squarely with *Alessi*, and raise the question anew whether state action not addressed to ERISA benefit plans as such are within § 514(a). *See* pp. 26-27, *infra*. The *Ingersoll-Rand* construction of § 514(c)(2) would also result in reading out of the statute the last eighteen words of § 514(c)(2). Under that construction, it appears, the only operative effect of that statutory section would be accomplished simply by including "any political subdivision, thereof, or any agency or instrumentality of either;" the rest of the statutory provision—"which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subsection"—would be superfluous. As such, the *Ingersoll-Rand* interpretation of § 514(c)(2), if applied generally, would violate " 'the established principle that a court should give effect, if possible, to every clause and word of a statute.' " *Feist Publications v. Rural Telephone Co.*, —— U.S. ——, 111 S. Ct. 1282, 1284 (1991), *quoting Moskal v. United States*, 498 U.S. ——, 111 S. Ct. 461, 466 (1990).

Moreover, the legislative history summarized above shows that members of Congress uniformly referred to state *regulation* in describing the preemptive reach of the final version of ERISA, within the statute's preemptive scope, not other forms of state action. *See* pp. 13-16, *supra*. And, in any event, the kind of

4. *Application of ERISA § 514(a) to the Connection Between the Equity Amendment Act and Respondent's Health Benefits Plan:*

The D.C. Circuit ruled that the Equity Amendment Act "relates to" ERISA-covered employee benefits plans within the meaning of ERISA § 514(a) because the state law defines the required health benefits payable to workers eligible for workers compensation as benefits equivalent to those provided under the employers' basic health benefit plan. 948 F.2d at 1323. This kind of connection between a state statute and an ERISA-covered benefit plan cannot suffice to support §514(a) preemption under the analysis of this Court's cases presented above:

First, as that analysis shows, this Court has never held that a purely verbal state law "reference to" an employee benefit plan, standing alone, is sufficient to "relate" the state law to the employee benefit plan in the § 514(a) sense.

Second, the Equity Amendment Act does not relate to ERISA-covered employee benefit plans under the genertlly applicable standard for determining the reach of § 514(a). The Act has no substantial, unavoidable impact on the ERISA-covered health benefit plans in question; nothing in the Act requires that employers alter their ERISA-covered plan in any way. And, *Shaw* establishes, as we have seen, that simply providing employers with the option of complying with a statutory requirement

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state action involved in *Ingersoll-Rand was* regulatory in the sense that it established a mandatory rule of behavior.

The reference to "regulat[ion]" in § 514(c)(2) should therefore be read, at a minimum, as a guide toward interpreting the "relates to" language in § 514(a) as ordinarly limited to such mandatory rules of behavior, rather than other forms of state action. Under that approach, only where the state statute unambiguously, directly, and predominantly "relates to" ERISA-covered employee benefit plans alone would that interpretative guide be unnecessary and non-regulatory state actions preempted as well.

through a qualifying ERISA plan, where a non-ERISA covered weeks of compliance is also available, is *not* a sufficient relationship to trigger § 514(a)'s preemptive force.

Third, the Equity Amendment Act is not within the narrow range of circumstances, exemplified by the garnishment exclusion aspect of *Mackey* and by *Ingersoll-Rand*, in which the state statute in question is specifically designed to affect ERISA plans, and singles out such plans for special treatment. Rather, the state law is designed to provide a flexible measure of an appropriate level of health benefits, sensitive to particular employment situations, payable by a workers compensation plan *exempt* from ERISA's coverage under § 4(b)(3). And the state law, far from singling out ERISA-covered health benefit plans for special treatment, expressly provides a means of compliance which leaves existing ERISA benefit plans entirely intact, and treats ERISA and non-ERISA health benefit programs identically for purposes of the statutory equivalency standard.

Fourth, and finally, the opinion below devotes considerable attention to demonstrating that the Equity Amendment Act "*could* have a substantial effect on the administration of an ERISA-covered plan" because "the additional financial burden associated with an increase in ERISA health benefits "—*viz*, the increase in non-ERISA health benefits—"*could* induce an employer" to "choose to forego such an increase altogether." 948 F.2d at 1325 (emphases supplied). Speculations of this kind on possible derivative employer reactions to the economic impact of state laws that do not otherwise "relate to" employee benefit plans within the meaning of § 514(a), cannot possibly supply the statutory relationship that does not otherwise exist.

All manner of state laws entirely separate from any ERISA-covered employee benefit plan may affect, for economic reasons, an employer's decision (or the decision

of an employer and a union through collective bargaining) whether to maintain particular ERISA-covered benefit plans, and what terms and conditions to include in such plans. State and local minimum wage laws, taxes on individual and corporate income, unemployment compensation and other payroll taxes, sales taxes, and environmental regulations all affect both the total cost of doing business in a particular area and the amount and nature of employee compensation, and may thereby influence, to the same or greater degree than does the Equity Amendment Act, the design of ERISA-covered employee benefit plans.[17]

The prevalence of this kind of economic interaction only demonstrates that complete insulation of ERISA-covered employee benefit plans from the *all* nonfederal legal influence, or even all substantial nonfederal influence, is an impossibility under our complex form of government. Congress clearly did not intend to enact such an absurdity in making a last-minute change broadening the preemptive scope of ERISA in the Conference Report. By far the better reading of ERISA § 514(a), as the legislative materials and case law surveyed above establish, is that what Congress addressed in §514(a) is the much narrower (but still numerous) class of state laws whose *purpose* is to affect ERISA-covered employee benefit plans, or that clearly, substantially, and inevitably have an impact on ERISA-covered plans.

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[17] For example, the opinion below conceded that there would be no preemption if the state statute simply specified minimum levels of health benefits payable to workers compensation recipients. If those minimum levels were higher than the health benefits paid under an employer's standard health benefit plan, the actual impact on the ERISA-covered health benefit plan is likely to be greater then the effect of the state law at issue here: The employer would be under pressure to conform its standard health plan to the one prescribed by the state for workers compensation recipients, yet would have less money available to distribute for health benefits generally because of the inflexibility of the law governing the ERISA-exempt plan.

* * * *

In totality, then, the Equity Amendment Act bears no different relationship to ERISA-covered employee benefit plans than a state rule that includes the economic value of benefit plans in calculating the damages due to an individual who has for some reason suffered an actionable decrease in earnings.[18] In both instances, there must be a verbal "reference to" the terms of the ERISA-covered plan in order to apply the state rule. In both instances, however, the state rule in question is designed not to affect the ERISA-covered plan, but to affect a form of compensation or payment entirely outside ERISA coverage.[19] And in both instances, the ERISA-covered plan is either not affected at all, or is affected only derivatively, speculatively, and insubstantially, through some conceivable influence on employers when they design their ERISA-covered plans worked by the prospect that injured employees will be entitled to equivalent benefits.

The lower courts considering the impact of ERISA's preemption provisions on such state law damages calculation principles have concluded, correctly in our view, that Congress could not have intended to reach tenuous connections of this kind through ERISA's preemption provisions. *E.g., Martori Bros. v. James-Massengale*, 781 F.2d 1349, *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479

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[18] These situations include, for example, violation of any employment contract; termination in violation of public policy, or without just cause, under a state statute or common law rule providing causes of action for such terminations; an automobile injury or other physical injury leading to incapacity to work; or illegal failure to bargain over a collective bargaining agreement, where state law covers the particular collective bargaining relationship and mandates a make-whole remedy replicating the economic value of the agreement that would have been reached.

[19] In a damages action, for example, individuals are typically paid in noncontingent cash, a form of compensation certainty not within ERISA's statutory coverage. *See generally Massachusetts v. Morash*, 490 U.S. 107 (1989).

U.S. 149 (1986); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988).[20] For the same reasons, there is no ERISA § 514(a) preemption of the District of Columbia's Equity Amendment Act.

CONCLUSION

For the above stated reasons, the decision of the court below should be reversed.

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[20] It bears noting, indeed, that workers compensation plans are a *substitute* for tort recovery, and ordinarily extinguish tort causes of action for occupational injuries. Were such tort causes of action still available against employers, damages for loss of compensation would presumably include retroactive damages measured by the economic value of health benefits lost during the period of incapacity. No reason appears why, in devising the workers compensation substitute, states cannot require that the same purpose be met by prospectively providing a non-ERISA covered benefit plan, similarly measured by the otherwise available health benefits.